UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

Adv. Proc. No. 16-01029-mg

- - - - - - - - - - - - - - - - - - - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - - - - - - - - - - - - - - - - - - -x

INVEST VEGAS, LLC, et al.,

Plaintiffs,

v.

21ST MORTGAGE CORPORATION, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 15, 2016

9:58 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

(CC: Doc # 9796) Motion for Objection to Claim(s) Number: 1296.

(CC: Doc # 9486) ResCap Borrower Claims Trust Ninety-Second Omnibus Objection to Claims ((I) No Liability Borrower Claims and (II) Allowed in Full Borrower Claim). Hearing Going Forward Solely as it Relates to the Claim Filed by Diem Trang Nguyen.

(CC: Doc # 9779) ResCap Borrower Claims Trusts Ninety-Third Omnibus Objection to Claims ((I) Redesignate and Allow Borrower Claims, (II) Reclassify and Allow Borrower Claims, (III) Redesignate, Reclassify and Allow Borrower Claims and (IV) Allow in Full Borrower Claims).

Adversary Proceeding: 16-01029-mg Invest Vegas, LLC, et al v. 21st Mortgage Corporation, et al.
(CC: Doc # 60) Motion for Summary Judgment.

Transcribed by: Esther Accardi
eScribers, LLC
700 West 192nd Street, Suite #607
New York, NY 10040
(973)406-2250
operations@escribers.net

A P P E A R A N C E S :

MORRISON & FOERSTER LLP

Attorneys for ResCap Borrower's Claims Trust

250 West 55th Street

New York, NY 10019

BY: NORMAN S. ROSENBAUM, ESQ.

JESSICA J. ARETT, ESQ.

HELFAND & HELFAND

Attorneys for 21st Mortgage Corporation

350 Fifth Avenue, Suite 5330

New York, NY 10118

BY: ANDREW B. HELFAND, ESQ.

DIANE BRADSHAW, ESQ.

MCBREEN & KOPKO
Attorneys for Invest Vegas, LLC
500 North Broadway
Suite 129
Jericho, NY 11753

BY: KENNETH REYNOLDS, ESQ.

LAW OFFICES OF CHRISTOPHER E. GREEN
Attorneys for Mary Perkins White
601 Union Street
Suite 4285
Seattle, WA 98101

BY: CHRISTOPHER E. GREEN, ESQ. (TELEPHONICALLY)

ALSO APPEARING TELEPHONICALLY:
SARA LATHROP, Residential Capital, LLC
CRYSTAL L. ELLER, Invest Vegas, LLC

P R O C E E D I N G S

MR. ROSENBAUM: Good morning, Your Honor. This is Norm Rosenbaum, Morrison & Foerster. With me is Jessica Arett.

THE COURT: All right. Why don't you begin, Mr. Rosenbaum?

MR. ROSENBAUM: I'm sorry, Your Honor?

THE COURT: Why don't you begin?

MR. ROSENBAUM: Thank you, Your Honor.

Your Honor, the first matter on the agenda is at page 5, Roman numeral IV. This is the ResCap Borrower Claims Trust objection to proof of claim number 1296, filed by Mary Perkins White. It's at docket number 97 and 96.

THE COURT: Is Christopher Green on the telephone for Ms. White?

MR. GREEN: Yes, Your Honor, I am.

THE COURT: All right, I see.

All right, Mr. Rosenbaum, go ahead.

MR. ROSENBAUM: Thank you, Your Honor.

Your Honor, also on the phone is Sara Lathrop, a senior claims analyst for the ResCap Borrowers Trust. Ms. Lathrop submitted both a initial declaration and supplemental declaration in support of the objection.

Your Honor, this is the ResCap Borrower Claims Trust objection to proof of claim number 1296 filed by Mary Perkins White. It's at, again, ECF 9796.

Your Honor, with respect to the underlying allegations regarding the Fair Credit Reporting Act violations which are asserted in the proof of claim, and have been briefed in the papers, the Borrower Trust does not believe there are significant factual disputes. I have a short summary I'll provide. But other than two legal gating issues that I'll address, I think what this comes down to is the claimant's capacity to prove actual damages, and I'll address that as we proceed.

Your Honor, on October 13, 2006 the claimant obtained a line of credit, a HELOC, with United Pacific Mortgage, GMAC began servicing the loan in December of 2007.

On July 14, 2009 claimant and GMAC agreed to a modification agreement, that agreement has been produced in exhibits to both parties' pleadings.

On or about July 23rd, 2009 GMAC received the necessary paperwork and the funds to execute the modification agreement, which was executed by the claimant. What became clear is that the modification was not executed by GMAC. Unfortunately, we don't have a reason as to why, but apparently it should have been.

THE COURT: Let me ask you this, Mr. Rosenbaum. Was the modification agreement effective upon signing by the claimant in the payment of the required fees? You agree that she signed and submitted the required payments, am I correct?

MR. ROSENBAUM: That's correct, Your Honor.

THE COURT: You agree that the modification was effective upon the debtors' receipt of the signed modification agreement with payments, it did require a countersignature by someone on behalf of the debtor to become effective?

MR. ROSENBAUM: Your Honor, I believe it did require a countersignature, but we have not taken a position in this objection that the modification was not effective. What we have done is we've acknowledged that it probably should have been executed. Again, there's not a reason why -- we don't have a reason why it wasn't executed, and we have probed that. But we do acknowledge that the failure to not execute and then the information that was furnished to the credit bureaus was in error.

THE COURT: The issue was that the debtors continued to report to the credit bureaus as if no modification had been entered into. So when Ms. White made payments consistent with the modification agreement, the debtors nevertheless reported payment defaults, is that correct?

MR. ROSENBAUM: That's correct, Your Honor. May I proceed?

THE COURT: One question I have, Mr. Rosenbaum, is whether -- how many alleged violations of FCRA occurred? It seems to me that there's a factual dispute whether GMAC continued to report incorrect information to the credit

reporting agencies after February 2011. But what's your position on that? This, in part, had to do with whether GMAC -- because I think it continued to report that this was a HELOC loan with a high balance of 200,000 dollars, which was no longer true after the modification. So I guess it did seem to me that there was potentially a factual dispute as to whether there were a continuing series of misreporting after February 2011. Could you address that?

MR. ROSENBAUM: Your Honor, what our -- yes, Your Honor.

What our records -- what GMAC's records reflect is that on February 25th, 2011 GMAC did submit a correction to the credit bureaus, and amended the credit report to reflect that there had been timely payments for August, September and October of 2009. And that's basically what GMAC had been incorrectly reporting prior to that time. And I think based on our analysis in review of the servicing records, we think there were probably seven instances prior to February 25th, 2011 in which that was incorrectly reported.

THE COURT: Okay.

MR. ROSENBAUM: We don't -- claimant did raise in their response a credit report from February 8th, 2012, that despite the fact that a correction was submitted by GMAC in the prior -- in February 2011, that again reflects that the account is 90 to 119 days past due. And the claimant did introduce as

an exhibit to I think the claimant's declaration a cover letter from the credit bureau that indicates that this improper information, or alleged improper information, was verified by GMAC.

We -- GMAC has not been able to verify -- the trust has not been able to verify that that report that's reflected in the credit report from February 8th, 2012 reflects reporting by GMAC, we've got no record of that. So we would dispute that issue, Your Honor.

THE COURT: So it's a disputed issue of fact then. Whether the plaintiff can prove -- put in proof that there was inaccurate reporting at that date, at least they come forward with evidence that puts -- if admissible, could support the contention there continued to be inaccurate reporting. Do you agree with that?

MR. ROSENBAUM: Yes, Your Honor.

THE COURT: Go ahead with your presentation.

MR. ROSENBAUM: Thank you.

Your Honor, claimant seeks damages for violation of the Fair Credit Reporting Act, which I'll refer to as FCRA, and common law causes of action for defamation and negligence. The claimant did commence a lawsuit that was stayed following the filing of the bankruptcy. The lawsuit proceeded against the reporting agent -- the credit bureaus. And our understanding from the papers that the claimant submitted, was

that the matter was settled with the credit bureaus.

Your Honor, we see two legal issues here. Whether the common law causes of action for defamation and negligence are preempted by FCRA, and whether the claimant is entitled to punitive damages. My understanding from claimant's response is that the alleged amount of proof of claim of 320,000 does not include a measure of punitive damages.

As we have set forth in our pleadings, the plaintiff's common law causes of action are preempted by FCRA. We rely primarily on Dvorak v. AMC Mortgage and other authorities, district court opinions in the Ninth Circuit. The Ninth Circuit itself does not address this issue. Claimant does site to Gorman v. Wolpoff & Abramson, and that's a 584 F.3d 1147, which that case highlights the issues and discusses it, but does not decide it. We believe that this issue should be decided by the weight of authority in the Ninth Circuit, and, again, rely on the analysis in Dvorak.

THE COURT: Answer this, Mr. Rosenbaum. Here the trust basically admits a FCRA violation. The issue that you really raise, and there may be an issue as to whether there was a continuing series of misreporting, but that's a factual dispute. But the trust doesn't dispute that there was an error by GMAC. And the issue then becomes what, if any, damages White is entitled to recover.

While it's an interesting, from my standpoint, legal

issue, other defamation causes of action preempt it. It seemed and I'm reading the papers, that the parties appear to agree that the measure of damages were both defamation and for FCRA would be the same. So it's not clear to me that I would need to resolve issue whether FCRA preempts a defamation claim.

And I think that one of the -- I just make an observation without deciding issue at the -- let me make sure I get the right case, bear with me a second. Yeah, in Loomis v. U.S. Bank Mortgage, which is a reported district court decision in Arizona from 2012, that -- which held that FCRA didn't preempt defamation negligence claims. But the court held that the claims for defamation negligence escape preemption only when the plaintiff alleges malice or willful intent to injure, which I don't necessarily read these pleadings as alleging. But while it may be a "nice legal issue" I'm not sure that it's dispositive here, because the real issue is okay, you've acknowledged, Mr. Rosenbaum, a FCRA violation, the question is is the plaintiff able to prove actual damages. What's your view as to whether, assuming that there is no preemption, whether the measure of damages would be the same on the defamation claim from the FCRA claim?

MR. ROSENBAUM: Your Honor, I've viewed that assessment and I think that would be the same. I don't think the measure of damages would be any different, the actual damages.

THE COURT: Is there anything else you want to add before I hear from Mr. Green?

MR. ROSENBAUM: The only other thing -- just two quick points, Your Honor.

One is the claimant's -- under the statute, if a willful or malicious violation can be proved, then the Court within its discretion can assess punitive damages. Your Honor has been clear and consistent in this case that punitive damages are not appropriate here, and would not serve any remedial purpose, and parties have agreed to that issue.

Your Honor, as I said, the claimant seeks 320,000 in actual damages. And we have had some discussions, and they've been somewhat generous in sharing information. I think we're prepared to continue to have those discussions. But I think the problem here is for us is connecting the dots. There are alleged sort of acts or consequences that claimant contends occurred as a result of the reporting and the reduction in the credit score. But the issue is sort of connecting the dots to -- to what the actual damages are.

Thank you, Your Honor.

THE COURT: Thank you very much.

All right, Mr. Green, go ahead.

MR. GREEN: All right. Yes, Your Honor.

Let's see, just first of all, I don't think there are a lot of disputes on the facts, but thought I'd just point out

in Exhibit A to my client's declaration is the letter she got from GMAC Mortgage, which basically says, let's see, "Your home equity line of credit is being closed as a result of this modification, and is being modified to a closed end mortgage. You'll be notified of your new account under a separate cover." And there's other information in there on what she should do. And her contention all along, and there's nothing inconsistent with it, is that she made full payments -- full timely payments.

The other factual matter deals with the February 2012 credit reporting, which I believe is under Exhibit N of her declaration, of Mary White's declaration.

Looking at the GMAC Mortgage reporting there, it appears to show on there items as of date recorded, and the date is January 2012, which I believe is a field that shows when the reporting last went to the credit reporting bureau. I'm not aware of any procedure where the credit reporting bureau would go out and get the information proactively from furnishers such as GMAC.

Then, let's see, looking at the common law causes of action, I believe the case Dvorak pointed to by opposing counsel, it references Gorman, but it is the -- that case I believe was decided while -- right after the trial court had dismissed the claim. It was before it was heard by the Ninth Circuit. And I don't think we have a lot of disagreements on

the common law -- the state of the law in the Ninth Circuit. But I believe the reported cases out of Arizona are the clearest on that issue --

THE COURT: Can't --

MR. GREEN: -- in light of -- yes, Your Honor.

THE COURT: Because in Gorman, the Ninth Circuit, I'm going to shorten what I'm going to read to you, but it refers to one of the sec -- one of the long sections. It appears to preempt all state law claims based on a creditor's responsibilities under another section. Section 6081(h)(E) suggests that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice.

You certainly allege falsity, but what's -- do you have any nonconclusory allegations of malice?

MR. GREEN: Well, Your Honor, I be -- in the complaint that the trust attached, I provided the complaint to the trust and they attached it as an exhibit to their objection. Let's see, I think it is the first exhibit if I'm not mistaken. I do have allegations in there of willful behavior.

Under the Fair Credit Reporting Act, it's been held in the Ninth Circuit, and I believe all the circuits as far as I know that willfulness and malice are reckless behavior using the standard under New York Times v. Sullivan. So I -- we never had -- we handled this case for quite a while and we never had anyone claim that we had not -- when GMAC was

actively involved in this, never said that we had not alleged that the reckless -- or at least the recklessness standard under the -- under the existing case law in the Ninth Circuit. Although, that was never -- we never got to summary judgment stage with GMAC, they filed months before that stage actually.

THE COURT: Sure. From my perspective, and I think it's encompassed by either of you, I'm going to overrule the objection. You're going to move forward -- either you're going to settle this or going to move forward to trial. So it isn't necessarily going to be what a pleading standard is. I don't know what proof of recklessness or malice, what your evidence is going to be that supports the required standard. But I think -- let me address very briefly, Mr. Green, because you haven't lived with the ResCap case, and obviously I have for quite some time. I have --

MR. ROSENBAUM: Yes, Your Honor.

THE COURT: As Mr. Rosenbaum has indicated, I've been quite consistent in not permitting claims for punitive damages to go forward. This is -- because this has been a liquidation case, and proceeds -- the net proceeds are being distributed to creditors in accordance with a confirmed plan, every additional dollar that comes out is a dollar less available for creditor distributions. And I've been quite consistent in -- I believe there's case support for this, that it doesn't serve the usual purposes for punitive damages. There's no punish -- the only

ones being punished are other creditors, other innocent creditors. So I've not permitted damage claims for punitive damages to go forward, and I've been pretty consistent throughout ResCap with respect to that.

So you may disagree, you may ultimately appeal it, but that's been my consistent ruling throughout.

So the issue here is going to be what actual damages you're able to prove. I understand attorney's fees, and things like that, I'm not talking about that. So what you're going to be able to prove, for present purposes, reject the trust's argument that they're entitled to have this claim expunged because you haven't satisfactorily established damages. And I've been pretty consistent with respect to claim objections throughout, if the issue was the amount of damages that's what we're going to have a trial about.

It does seem to me that both sides here ought to quite seriously pursue settlement, and I don't get in -- I don't involve myself in settlements since I ultimately have to be the trier of fact. I certainly encourage the parties where appropriate to get a mediator, a mutual mediator, see whether that will help in resolving things. But I won't personally get involved in settlement negotiations.

As I said earlier in talking with Mr. Rosenbaum, I don't think I need to decide at this stage, in any event, a preemption issue. There's a split, arguably a split in

authority in district courts in the Ninth Circuit. I don't know of any controlling authority on it in Second Circuit. If the measure of damages is going to be the same under both FCRA and defamation, and the trust essentially is not disputing that there were FCRA violations, there may be a question whether there's February 2012 violations as well, that that's a disputed issue of fact. But the trust doesn't dispute that there were FCRA violations here, so the issue's going to be what damages you're able to prove.

I guess my questions, and since I've got you speaking now, Mr. Green, what, if any, discovery do you wish to take?

MR. GREEN: Well, Your Honor, I guess I would have to confer with opposing counsel. I understand some of the -- from the previous case, that some of the information going back and forth might have involved outsourcing to India, if I'm not mistaking it with another party. But, yeah, I think communications between the credit reporting bureaus and them, and then any communication with the client, including if there were any tape recordings of communications. And that's off the top of my head, Your Honor, and that's most of what we'd be looking for on it I think.

And I do have -- GMAC did provide some discovery before -- before they filed bankruptcy, I think it was just a few weeks before, so I did not had a chance to go over that. But I can discuss with opposing counsel, and if it's okay with

you, we could see if we can come to agreement on the scope of discovery and bring any -- and I've got to admit, I'm not totally conversant with local rules, but if we can bring it in an informal fashion to you if we do have any disputes, I would be open to that if opposing counsel is.

THE COURT: All right. Mr. Rosenbaum, on what discovery, if any, did the trust want to take?

MR. ROSENBAUM: I mean, Your Honor, obviously that the -- part of it depends on what claimant is alleging in terms of the effects of and consequences of the reporting and the client credit score. There were allegations that an inability to refinance, that credit lines and various credit cards were reduced. The claimant has also at least attached an expert report I think from the litigation, or from prior litigation. So part of it would depend on these external sources, but clearly, you know, we have an expert issue here, we have need to depose the claimant. Also, we don't know to what extent claimant is relying on any medical testimony for emotional distress damages which she's also alleging as part of -- as part of the violations, as part of the damages.

THE COURT: Yeah, I know -- I know that's in the case, and I didn't look, is there any law on whether emotional distress damages are recoverable on a FCRA violation?

MR. ROSENBAUM: I believe in the Ninth Circuit --

MR. GREEN: Yes, Your Honor -- oh --

THE COURT: I'm not -- yeah, Mr. Green.

MR. GREEN: I apologize.

THE COURT: Go ahead, Mr. Rosenbaum.

MR. ROSENBAUM: I'm sorry, Your Honor, it's Norm Rosenbaum, are you addressing the question to myself?

THE COURT: Yeah, to you first. What do you understand the law to be on whether emotional distress damages are recoverable in a FCRA violation?

MR. ROSENBAUM: In the Ninth Circuit, our understanding is that they are recoverable for FCRA violations.

THE COURT: Mr. Green, do you want to address the issues?

MR. GREEN: Yes, Your Honor. Emotional distress damages are recoverable. The local case is Lambert (ph.) case that I happened to brief, but the larger case that preceded that was the Ninth Circuit case, Guimond v. Trans Union. And it essentially allows for establishing emotional distress damages without using medical testimony. It's very distinct from state causes of action that require, in some cases, information from a doctor established by the plaintiffs. And we are not seeking to prove with the doctor.

I'd have to look at the file, see if she ever did talk to a doctor, and mentioned it in passing, but we would not be seeking to prove with medical testimony. But I can certainly provide opposing counsel if she did mention -- see a doctor,

and mention it, it sometimes comes up in these cases. But we would not be looking to prove with any such statement.

THE COURT: Mr. Green, I'm not holding you to it at this point, but can you tell me briefly what you believe your compensable actual damages are here?

MR. GREEN: Well, Your Honor, the main part is emotional distress, although there were lost opportunities for credit. She had her credit reduced during this time. She had to sell things because her credit line had been reduced. But the emotional distress aspect I think is the main part of it. I don't want to overemphasize the -- any exact dollar loss. And in a lot of these cases, it's very difficult with multiple defendants to point to what exactly happened with who.

But her being threatened with foreclosure by a representative of GMAC is a big part of it. And she's a single woman during a recession trying to keep her head above water. And she was not -- and she has otherwise excellent credit. And this went on for twenty-nine months if we go with the credit reporting from February 2012. And that was well into the case after she had hired attorneys, and experts -- an expert, and then that I think was what we will show is the worst part of it for her was --

THE COURT: Well, let me --

MR. GREEN: -- there.

THE COURT: -- see if I can call this to an end.

What I'd like Mr. Green and Mr. Rosenbaum to do is confer promptly in trying to agree on the terms of a cash management and scheduling order.

Mr. Green, I have a standard form template for case management scheduling orders that I apply in both contested matters and in adversary proceedings. The form itself is on the Court's Web site under my chamber's rules. Mr. Rosenbaum can certainly share it with you.

My sort of default rule is 120 days for fact discovery, and expert reports typically forty-five days thereafter. But what I would like you to do is for the two of you to confer certainly by next week and see if you can agree on a proposed case management scheduling order consistent with the template that I use.

And so you're both going to need to think about what discovery you're going to need to take. Here it does seem to me that many of the facts that you can stipulate to are facts regarding each alleged inaccurate report to the credit agencies. To the extent that there's a dispute about the February 2012, I'll see whether you can satisfactory resolved the dispute about that, or again, if I had an issue, figure out what if any depositions you want to take, et cetera. Those don't necessarily get listed in the case management order, but I am going to want a case management scheduling order by the end of next week. And if it's inconsistent with

the -- my normal timing and if it's not, and if it's not, you're going to need to explain in a cover letter about why more time than the normal is required.

Mr. Green, with respect to -- you raised an issue. If -- and Mr. Rosenbaum certainly knows this and the form of the case management order certainly reflects that -- if there are any discovery disputes, I generally don't take discovery motions, if -- the parties are first to meet and confer to try and resolve the issue. Any party believing it needs the assistance of the Court will arrange a telephone call with the Court. Those calls are usually at 4 or 5 in the afternoon.

I don't even want anything in writing ahead of time. I'm usually able to resolve those discovery issues in one call, without anybody having to file briefs. If I believe that -- if there's a privilege issue that I think I need brief, I usually require letter briefs on a very short time schedule. So I try to expedite involving any discovery, and what I find, Mr. Green, is these conferences typically get scheduled within a day or two of a request. And so when parties --

MR. GREEN: Okay, Your Honor.

THE COURT: -- that the Court is going to resolve it quickly, somehow they manage to resolve it themselves. I rarely have to deal with these issues. But that's just -- Mr. Rosenbaum knows all of that from other matters, so it isn't just in ResCap, that's all my -- all the matters before me.

So why don't you confer and see whether you can agree on a schedule. Mr. Rosenbaum can also provide some more general background. When -- this does not strike me as a case that's going to appropriate for summary judgment. There's going to be factual issues, primarily of the damages, and I set -- I try to get these things resolved pretty quickly. I set trials pretty quickly.

I frequently do them as so-called timed trials. I allocate a number of hours to each of you. Use it as you wish. I generally require direct testimony in declaration format, so any declarant has to be in court and available for cross-examination. Obviously, if they're third party witnesses and you can't subpoena them to court, you're going to have to take their deposition to do that. So -- but that's just -- let's proceed from here.

I think the two of you really ought to discuss whether you can settle it on your own, or whether a mediator could help. It gets expensive when you start having to get ready for trial here, and I don't do trials by telephone. Everybody has to be in the courtroom. Okay, Mr. Green?

MR. GREEN: Yes, Your Honor. And just very quickly, everything sounds good, but on scheduling, could we have the order or the proposed scheduling order in two weeks? I'm actually calling from Spain right now, and I get back early next week. I think I'll be able to get -- to confer with

opposing counsel next week, but I'll probably have to see what -- it might be a little jumbled up next week I guess is what I'm saying, Your Honor.

THE COURT: That's an eminently reasonable request. That's fine with me. Where in Spain are you?

MR. GREEN: I'm in Madrid, Your Honor.

THE COURT: Very good. Okay, do it within two weeks, okay, Mr. Rosenbaum?

MR. ROSENBAUM: That's fine, Your Honor.

THE COURT: Okay, enjoy the rest of your trip to Spain.

MR. GREEN: Okay, thank you, Your Honor.

THE COURT: All right.

So I guess the next matter on the agenda, what is it, Mr. Rosenbaum, it's --

MR. ROSENBAUM: It's page 6, number 6. It's the ResCap Borrower Claims Trust ninety-second omnibus objection to claims.

THE COURT: Okay.

MR. ROSENBAUM: And I will cede the podium to Ms. Arett.

THE COURT: Thank you.

MS. ARETT: Good morning, Your Honor. Jessica Arett of Morrison & Foerster on behalf of the ResCap Borrower Claims Trust. As Mr. Rosenbaum said, the next claims objection matter

on the agenda is number 6, the Borrower Trust's ninety-second omnibus objection to claims, which we filed at docket number 9486 on January 7th, 2016.

Your Honor, through the ninety-second omnibus claims objection, the Borrower Trust seeks to expunge proofs of claim that do not represent valid pre-petition claims against the debtors, because they do not prove by a preponderance of the evidence any specific wrongdoing by the debtors. The Borrower Trust thoroughly examined the debtors' books and records in an effort to validate the accuracy of the allegations made in the response and the claim at issue, and determined that the books and records do not show any liability to and owing the respondent.

The Borrower Trust adjourned the ninety-second omnibus objection as to Ms. Nguyen's claim. It's claim number 3725. And Ms. Nguyen filed a response on May 13th, 2016. I'm not sure if she's on the phone.

THE COURT: All right. Is Ms. Nguyen or anyone on her behalf? She's not showing on the check-in list.

Is Ms. Nguyen, are you on the phone?

All right. Go ahead, Ms. Arett.

MS. ARETT: So the Borrower Trust filed its reply on June 9th, 2016, at docket number 9929. And in support of the objection and the reply, the Borrower Trust submitted a supplemental declaration by Sara Lathrop, senior claims analyst

for the Borrower Trust as Exhibit 1 to the reply. Ms. Lathrop is on the phone today, as Mr. Rosenbaum mentioned and is available to answer any questions that the Court may have for her.

Your Honor, Ms. Nguyen's unliquidated claim is premised on two lawsuits, one filed in federal court and one filed in state court, and both lawsuits have been dismissed with prejudice and are currently pending on appeal. Pursuant to the rules of res judicata that apply when a federal case is based on federal question jurisdiction as is the case here, the federal courts dismiss all -- retains all its res judicata effect pending the appeal of that decision. And as of a result, a portion of the claim that is based on the federal litigation is barred by the doctrine of res judicata.

THE COURT: And that's true as to the state law claims that are premised on supplemental jurisdiction?

MS. ARETT: Yes, Your Honor.

THE COURT: Here's -- Ms. Arett, here's my question for you. I agree with your reading of the law on res judicata. And so the district court opinion that dismissed Ms. Nguyen's claim should be given preclusive effect for purposes here. But Ms. Nguyen did timely appeal, but the appeal is stayed because of the Chapter 11 bankruptcy filings. And isn't she entitled -- I don't know; is it a he or a she? I wasn't sure.

MS. ARETT: I think -- it's a she I believe.

THE COURT: Is she entitled to her day in court on -- if I sustain your objection and find that as to this prong that the federal res judicata rule applies, in that the district court decision should be given preclusive effect, should I also lift the stay to permit Ms. Nguyen to prosecute her Ninth Circuit appeal if that's what she chooses to do?

MS. ARETT: I believe that would be appropriate, Your Honor.

THE COURT: Do you know what the status of that -- what -- it was unclear to me what the status of the appeal was?

MS. ARETT: I believe it's -- I'm sorry, do you mean --

THE COURT: I mean, was it -- is it fully briefed? What's the status in the Ninth Circuit?

MS. ARETT: I believe it was fully briefed. I mean, I think we have the docket, and it's one of my -- let me find it. One moment.

THE COURT: I know the appeal was filed on October 11th, 2011.

MS. ARETT: Correct. I actually don't have the appeal docket. I just have the district court docket, so I would have to double-check and find out if the appeal has been briefed.

THE COURT: And with respect to the state court, your position is that the unlawful detainer action, which Fanny Mae prevailed in, and that was appealed -- being appealed to the

state appellate court, and on April 27th, 2012, the unlawful detainer judgment was affirmed on appeal.

MS. ARETT: Correct.

THE COURT: So your view is that -- that's final, and that would be entitled to a preclusive effect here.

MS. ARETT: That's correct, Your Honor.

THE COURT: So my question is to you, what claims that are being asserted here are barred by the preclusive effect of the unlawful detainer judgment?

MS. ARETT: So any claim that has as its basis anything that would challenge the foreclosure. I believe at least portions of the breach of contract claim, the wrongful foreclosure claim, the quiet title claim, the slander of title claim, the cancellation of instruments claim, portions of the fraud claim and the intentional negligent misrepresentation claim, and kind of by default, portions of the business -- California Business UCL claim. I'm wondering if I missed any. But I believe that would have been the ones that were -- are barred by the unlawful detainer action.

And then the remainder, such as the fraud claim and the breach of contract claim, are barred for other reasons that we briefed, and I can get into it, if you want.

THE COURT: Okay. Just address that briefly, okay. So, that's what I was really focusing on. What is the unlawful detainer judgment giving preclusive effect? What does it wipe

out? What's left after that and on what basis do you seek to expunge the remainder of the claims?

MS. ARETT: So the negligent misrepresentation and negligence claims would be barred on the basis that she has not sufficiently demonstrated that GMAC Mortgage owed a duty. I believe the law in California is that banks, and as a result, servicers, do not owe a duty to borrowers, in the case of -- just typical mortgage transactions. The promissory estoppel claim is barred because if you look at the complaint, she doesn't actually make any allegations against GMAC Mortgage.

The breach of contract claim is barred -- sorry, Your Honor; I'm kind of flipping through things.

THE COURT: That's okay.

MS. ARETT: I think -- I believe the basis for her breach of contract claim, other than the wrongful foreclosure is an allegation that GMAC Mortgage did not alert her to the transfer of her deed of trust to Nationstar.

THE COURT: It's probably around a provision that didn't require you to give notice on.

MS. ARETT: Exactly, and in fact, if she's alleging that we did not give her notice of transfer of servicing, we did, in fact, by evidence of the goodbye letter that we attached as Exhibit D to the reply.

THE COURT: Okay, all right. All right, anything else you want to add?

MS. ARETT: I believe that's it, Your Honor.

THE COURT: I'm going to take it under submission and we'll enter a written opinion or order. Thank you very much, Ms. Arett.

MS. ARETT: Thank you, Your Honor.

And then the final -- well, the final matter at least for the Borrower Trust on the objection -- on the agenda is agenda matter number 7, the ResCap's Borrower Claims Trust's ninety-third omnibus objection to claims, which we filed at docket number 9779 on March 23rd, 2016.

And Your Honor, through that objection, the Borrower Trust seeks to modify proofs of claim that were filed against the incorrect debtor and/or improperly assert a secured priority claim. The Borrower Trust also seeks to allow these claims as modified, as well as other claims identified in the ninety-third omnibus objection, because these claims are all asserted in amounts below the applicable bar convenience class amounts, and other than the defects to the asserted debtor or the classification, there does not appear to be a substantive basis on which to object to such claims.

THE COURT: I mean, as I understand, the only person who filed an opposition on the objection is Beverly Blake?

MS. ARETT: Correct, and I'm not sure if she's on the phone.

THE COURT: Ms. Blake, or anyone on behalf of Ms.

Blake, are you appearing today?

No one's appearing on behalf of Blake.

But I've read the Blake opposition, which is at ECF docket 9849, and the Trust did follow a reply, which is 9887. I try to have a -- just address the Blake issues.

MS. ARETT: Okay, and then before addressing the details of Ms. Blake, I would also just like to point out that we would respectfully request that the Court grant the ninety-third omnibus claims objection as to the uncontested claims.

THE COURT: All right. Let me deal with that right now. So the ninety-third omnibus objection is sustained as to everyone other than Blake --

MS. ARETT: Thank you, Your Honor.

So on her proof of claim form, Ms. Blake identified her claim as a priority claim under Section 507(a)(7) of the Bankruptcy Code. Ms. Blake asserts that her claim is based on the improper origination of her loan. And Section 507(a)(7) of the Bankruptcy Code provides that claims that arise from the deposit before the commencement of a case of money in connection with the purchase, lease or rental of property or the purchase of services for the personal, family or household use of such individuals, where the property or services were not delivered or provided.

Here, Ms. Blake has not identified any deposits that she made with Homecomings, but rather asserts her claim is

based on higher interest rates and fees that she has been required to make. And additionally, her claim far exceeds the cap of 2,600 dollars on 507(a)(7) priority claims. And so the Borrower Trust has not identified any other basis for granting the claim priority status, and thus it is our position that the claim should be reclassified as a general unsecured claim and allowed in the asserted amount.

THE COURT: Am I correct that the Trust doesn't -- you're seeking to have the claim reclassified, but agree that she be allowed against Homecomings in the amount of 26,000 dollars?

MS. ARETT: Correct, Your Honor.

THE COURT: All right. The Court has reviewed the ninety-third omnibus objection and has specifically reviewed the Blake opposition and the reply that was filed. The issue here is under Section 507(a)(7), whether the Blake claim is entitled to receive a priority. As Ms. Arett has read -- I won't further read the section, Ms. Arett has done that already. 507(a)(7) does not apply in the circumstances. Consequently the objection is sustained. The Blake claim is reclassified and allowed as a general unsecured claim against Homecomings in the amount of 26,000 dollars.

And I'll just reflect that ruling in the proposed order that you submit, Ms. Arett, okay?

MS. ARETT: Will do, Your Honor. Thank you very much.

And with that, I think there's one more matter. An adversary proceeding --

THE COURT: Yeah.

MS. ARETT: -- on the agenda, so I will cede the podium.

THE COURT: Counsel --

MS. ARETT: I --

THE COURT: -- this is Invest Vegas, LLC v. 21st Mortgage Corporation. It's adversary proceeding 16-01029.

MS. ARETT: I --

THE COURT: Who's appearing for each of the parties in that?

MS. ARETT: Oh, and just one -- this is Jessica Arett again, Your Honor. If -- may me and Mr. Rosenbaum be excused?

THE COURT: Absolutely.

MS. ARETT: Thank you very much.

THE COURT: Thank you very much.

THE COURT: All right. Could counsel in Invest Vegas please make your appearances?

MS. BRADSHAW: This is counsel for defendant, 21st Mortgage in the adversary proceeding, 16-01029-mg. Diane Bradshaw of the firm of Helfand & Helfand, representing 21st Mortgage Corporation.

THE COURT: Okay.

MS. BRADSHAW: Proceed, Your --

THE COURT: All right. Who's appearing for Invest Vegas? Is anybody appearing?

THE CLERK: Your Honor, counsel apply.

THE COURT: Okay, go ahead.

MS. ELLER: Good morning, Your Honor. Sorry about that. I am Crystal Eller. I'm appearing from Las Vegas, Nevada, bar number 4978 for Invest Vegas, LLC. Also Mr. Kenneth Reynolds, local counsel, is supposed to be there this morning, but my understanding is he missed his train due to a traffic accident and is supposed to arrive any moment.

THE COURT: All right. He did call -- my courtroom deputy advised me earlier that because of a traffic accident, he was running late. He thought he would be here by now. But Ms. Eller, are you prepared to argue?

MS. ELLER: Yes, I can argue, if we need to move forward, Your Honor.

THE COURT: Yeah, I did want to move forward, okay.

MS. ELLER: Okay.

THE COURT: So, Mr. Bradshaw, do you want to -- this is your motion.

MS. BRADSHAW: Should I proceed, Your -- it's Ms. Bradshaw, Your Honor.

THE COURT: I'm sorry. I apologize.

MS. BRADSHAW: That's okay. You -- I may proceed?

THE COURT: Yes, you can.

MS. BRADSHAW: Okay, thank you.

21st Mortgage is the current holder of a promissory note that originated in the amount of 636,600 dollars and also the holder of the deed of trust that, but for Nevada HOA Lien Law, would be in first position. All of these documents have been annexed to the moving papers. This is all secured by a real property comprising a condominium unit located at 230 East Flamingo Road, number 301, in Las Vegas, Nevada. At all times relevant in this case, Meridian Private Residences Homeowners Association was the homeowners association, which is hereto referred to as the HOA, that oversaw and managed the subject property.

On or about June 25th, 2009, the HOA reported a lien for delinquent assessments against the subject property and then nearly two years later sought to reinforce the lien -- sorry, to enforce the lien when it recorded notice of default on or about June 16th, 2011, and an election to sell pursuant to the lien for delinquent assessments.

On or about October 19th, 2012, the HOA recorded a notice of foreclosure sale and set a foreclosure sale date for November 14th, 2012. The HOA then took back the subject property out of the HOA lien sale that purportedly took place on November 20 -- sorry, November 14th, 2012, and this -- the deed -- the subsequent deed was recorded on December 19th, 2012.

The related bankruptcy case herein, In re: Residential Capital, was commenced on May 14th, 2012, thus placing the subject property or any of the assets that would be affected by such property under an automatic stay pursuant to 11 U.S.C. 362, the automatic stay.

21st Mortgage acquired all rights to enforce the note and deed of trust by virtue of a transfer from debtor subject to the terms of the bankruptcy sale order, signed by this Court, that issued -- or was entered, actually, on November 21st, 2012, and we here fore refer to this order as the 365 sale order.

Under the terms of the 365 sale order, dated November 21st, 2012, Berkshire Hathaway was purchaser of the note and deed of trust that would -- but for applicable Nevada law -- be first position. Berkshire subsequently deposited the note and deed of trust into a Delaware statutory trust, which is referred to as the Knoxville 2012 Trust, and subsequently authorized 21st Mortgage Corporation to have the servicing rights in connection with the note and deed of trust, and also 21st Mortgage acquired through a master servicing agreement such servicing rights.

At the time of the acquisition by Berkshire of the note and deed of trust, they were -- these -- this collateral were assets in the bankruptcy court case, and this is evidenced by us scheduled 2.2 -- this is referred to as schedule 2.13,

which was attached to the asset purchase agreement, which was made part of the 365 sale order. All of these papers are exhibits in our moving papers. Then also, furthermore, the assignment to 21st Mortgage was memorialized by a recording of the assignment of the deed of trust to 21st Mortgage, and that was dated August 19th, 2014.

Under the terms of the 365 sale order, the -- this Court retained jurisdiction over the interpretation and enforcement of the 365 sale order and was authorized to protect the purchaser against any claims against the purchased assets. And this language was reiterated numerous times throughout the 365 sale order and he had brought it to the Court's attention numerous times in our moving papers.

Most relevant, under the terms of the 365 sale order, Berkshire took possession of the purchased assets free and clear of all interests of any kind or nature whatsoever including all rights or claims based upon any successor or transferee liability. And this is set forth at paragraphs O and P and then numerous times throughout the 365 sale order.

Subsequently plaintiff Invest commenced an action in Nevada district court seeking to quiet title pursuant to the deed for the subject property out of its lien sale, and it sought against all and any parties including 21st Mortgage who might claim an interest in the subject property, and of course, the interest of 21st Mortgage in the subject property arises

out of its ownership of the note and the deed of trust, which follows the note.

Plaintiff -- sorry, 21st Mortgage filed an amended petition of removal based on the federal question jurisdiction, namely the 362 automatic stay, but plaintiff --

THE COURT: Let me just interrupt you if I could. I mean, I understand how the case gets here. To me, the issue is whether the interest in the note and deed of trust were property of the estate, and it seems to me -- and this is what I'd like you to address is, the Supreme Court's White & Pools decision, where it said, in part, "The legislative history indicates that Congress intended to exclude from the estate property of others, in which the debtor had some minor interest such as a lien or bearer of legal title. Similar statements to the effect that 541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor."

So why -- how do you deal with the language in White & Pools. There's also the district court decision in Virginia -- in Eastern Virginia -- in In re: March, that held that the debtor's junior lien interest not convert the underlying secured property owned by a nondebtor into property of the bankruptcy estate, subject to the provisions of the automatic

stay, and that district court decision was affirmed on appeal by the Fourth Circuit.

So that's really where I would like you to focus.

MS. BRADSHAW: Well, Your Honor, we would argue simply that the automatic should be applied, because pursuant to 362(a)(4) or (5) or (6), any act to create, perfect or enforce any lien against a property of the estate. And the point is that, yes, the real property was not the property of the estate; the note and deed of trust were. But the transfer of the property and the inability to foreclose on the real property vitiates the value of the purchased asset, and by this Court's own language, the purchased assets should be free and clear of such threat of being rendered valueless in essence.

So the relief --

THE COURT: But it hinges on it being property of the estate. That's the issue. And --

MS. BRADSHAW: Exactly, and --

THE COURT: -- and there are problems. If it was property of the estate, the automatic stay applied, and I won't deal with the free and clear provisions for now. But it seems to me that the crucial issue is, whether this was property of the estate.

MS. BRADSHAW: Well, the district court did find in the underlying case, in 2:15 C.B. 644, the court agrees that the subject property was not part of the estate, meaning the

real property. 21st Mortgage and it predecessors in interest to the note and deed of trust were never owners of the subject property. That is not, however, what is at issue, as you -- Your Honor points out.

21st Mortgage does not contend that the subject property was part of a Residential Capital case, and this is the pertinent language. It contends that a "promissory note secured by a deed of trust creating a security interest in the subject property was part of the bankruptcy estate." And the court found that the note and deed of trust were part of the estate.

Thus based upon that ruling and interpretation of 362(a)(4), (5) and (6), we would maintain that the note and promissory -- excuse me, the promissory note and the deed of trust were indeed properties of the estate, and thus should be protected by the 365 sale order.

THE COURT: Okay, anything else you want to add, Ms. Bradshaw?

MS. BRADSHAW: Just, Your Honor, that we would, if the Court were to find in our favor, we would like to amend our prayer for relief. We -- rather than -- of course, we do want to find a motion for summary judgment in our favor, and we would like to see the HOA lien sale declared null and void and set aside ab initio. But do not wish to dismiss the case, because the relief -- eventual relief we seek -- is to be able

to go forward with our own foreclosure and sale, and to resolve the issue of the super lien or the Nevada applicable law under that context.

THE COURT: Okay.

All right, Ms. Eller, do you want to argue, please?

MS. ELLER: Thank you, Your Honor. And may I say I appreciate you focusing the issues here. There really is one issue and that is whether or not the actual real property, which is the condominium located in Las Vegas, Nevada, was part of the --

MR. REYNOLDS: Excuse me, Your Honor. I'm sorry. Kenneth Reynolds, McBreen & Kopko. I'm local counsel to Nevada counsel that's on the phone. I was delayed by traffic, and just made it to the courtroom. So it would be my intent to argue on behalf of Invest Vegas.

THE COURT: Ms. Eller, who do wish to have speak?

MS. ELLER: Oh, Mr. Reynolds, may speak.

Thank you for arriving, Ken.

THE COURT: Okay. And I said earlier, Mr. Reynolds, that I was advised by my courtroom deputy that you had called and explained that you were going to be late because of a traffic accident, with difficulty commuting into Long Island. So that's fine. Go ahead, Mr. Reynolds.

MR. REYNOLDS: Again, my apologies to the Court, Judge.

THE COURT: Go ahead.

MR. REYNOLDS: From my perspective, Your Honor, the movant for summary judgment has missed the point. They have not cited one single case that addresses the issue of a junior lienholder who has a collateral security interest against property owned by a nondebtor which property is not part of the debtors' estate. They go on and on with respect to cases cited in their memorandum of law that deals with applicability of the stay. Each one of those cases is clearly distinguishable from the present situation before the Court now.

I could go through each case cited by the movant if Your Honor would be interested in me doing so to establish that the facts present in each of those cases are readily distinguishable from the facts present in our case.

THE COURT: You don't need to go through each case, but I think you ought to address what you view as the salient principals what those cases stand for and why this is different.

MR. REYNOLDS: Judge, I think what it boils down to is -- well, first we could start with the authority that we did cite which they were unable to distinguish from the present situation. And one of those cases, Judge, is the United States Supreme Court in Whiting Pools.

In a footnote, in Whiting Pools, the court noted that -- and I'll quote directly; this is from page 522,

footnote 8 -- "Section 541(a)(1) speaks in terms of the debtors' interests in property rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section.

"The legislative history in the case that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title." And the court cites to 124 Cong. Rec. 32399, pinpoint 32417.

Subsequent to Whiting Pools, the one case cited by either party, that being cited in the opposition brief to plaintiff's motion for summary judgment is In re Lloyd March which was decided by the United States District Court for the Eastern District of Virginia, and that case was decided in 1992 (sic).

That case dealt specifically with the scope of the 541(a)(1) interests in property of the estate, and attached thereto would be the scope and impact of the automatic stay.

So in the March decision, the court concluded that property owned by a nondebtor would not be impacted by a debtors' filing who held a junior lien interest, and the court concluded that the junior lien interest, being nothing more than an interest in property, not a property interest, was not subject to the automatic stay.

The court went through a well-reasoned decision in

reaching that conclusion, and I'd like to quote some of the language for the record. And at page -- I'm sorry; give me a minute, Judge. At page 4, headnote 5 -- well, actually, it's page 5, the court states, "Although the Bankruptcy Code does not specifically address this situation" -- that being the junior lienholder situation -- "the language of the relevant provisions, and the authorities interpreting the Code, and addressing the issue persuade this Court that a debtors' junior lien interest does not convert the underlying secured property owned by another into property of the bankruptcy estate, subject to the provisions of the automatic stay.

First, nothing in the provisions of the automatic stay itself protect the debtors' junior lien interest. Other courts considering the issue, have concluded that the automatic stay imposed by 11 U.S.C. Section 362 (a) does not prevent nonjudicial foreclosure of a senior real estate property security interest when the holder of a junior security interest in the same real property files for bankruptcy relief."

That's the exact situation present before us here today, Judge.

They cite to Thomas J. Holthus, a debtor as a creditor in the automatic stay, found at 62 Am. Bnkr. L.J. 377 (1988). And then it goes on to say that "discussing the few cases that have addressed this issue, and pervasively distinguishing those cases that enforce the automatic stay" and that would be, for

instance, the case that we cited in our brief, Bibo which was a Las Vegas decision which held directly that a junior lien interest in property of a nondebtor, the lower court held that it was property of the estate subject to the automatic stay, and that decision was reversed on appeal by the Ninth Circuit.

So there's no case law in support of movants' position, and we've established case law that has not been refuted that states junior interests in property owned by another are not property of the estate and are not, therefore, subject to the automatic stay.

Judge, in many of these cases where this type of issue presents itself, the debtors seek an order of the Court to establish the applicability of the automatic stay and seek to obtain an order to stop the process which is going on in a nonjudicial form as it was here with the judicial sale -- nonjudicial sale, by the homeowners' association of its super priority lien.

It was a public record; everyone was aware. They had every opportunity to try to make the stay, or try to establish that the stay was applicable, and they didn't. So all they do is they continue to refer to the 363 sale order and all the standard provisions that are in a 363 sale order concerning others that maintain an interest in the debtors' property, or interests that are superior to the debtors' property, that being the junior lien, but that order was signed subsequent to

the foreclosure sale.

So from my perspective, there's no basis by which you can argue that any of those provisions in the sale order would have avoided, or created some sort of an estoppel for the HOA sale because the HOA sale already occurred. So I think we're left with the very, very basic simple issue is that junior lien of 21st Mortgage property of the bankruptcy estate and if so, the applicability of the stay? I say no. The case law I cited, including the Supreme Court, says no. It sort of turns the bankruptcy on its head.

Bankruptcy was meant to protect a debtor from creditors where 21st Mortgage is a creditor. They weren't forced into the bankruptcy by the property owner.

Property owner's an innocent nondebtor party to this, and the debtor is a creditor of that homeowner, and they're making the argument that as a creditor they're seeking stay relief to protect their interest to go against the debtor? That is not, in my view--

THE COURT: Mr. Reynolds, a question.

MR. REYNOLDS: -- and in my reading of Congressional intent --

THE COURT: Mr. Reynolds, I want to stop --

MR. REYNOLDS: -- concerning the stay applicable or readily usable by the 21st Mortgage in this case.

THE COURT: All right. Take a breath, Mr. Reynolds.

One of the -- it does seem to me that this case raises a fairly legal issue that I think is going to be dispositive for one side or the other. What I have is one side's (indiscernible) for summary judgment. I don't have a cross motion for summary judgment.

56(f), the Court, after giving notice and a reasonable time to respond, the Court may make some judgment for a nonmovant to grant the motion on grounds not raised by a party here -- I think everybody raised an issue -- to reconsider summary judgment on its own after identifying the parties -- the party material facts that may not be genuinely in dispute.

This does seem to me to be an issue where the facts on the central issue are not in dispute, but I only have a motion from one side. I would ordinarily not be inclined to simply address the issue on my own sua sponte, however, Rule 56(f) clearly permits me to do that.

Let me first give Ms. Bradshaw a chance to respond and then we'll come back however you want to proceed.

Ms. Bradshaw, go ahead; you want to reply?

MS. BRADSHAW: Thank you, Your Honor.

Our response is simply, Your Honor, that this Court's language is crystal clear and yes, we concede that the bankruptcy law itself did not perhaps contemplate this complexity of eventual events coming out of the original filing. However, what we have here is a societal sea change

and the sale order is -- a 365 sale order is really the powerful and governing document in --

THE COURT: The 365 sale order deals with a sale of property of the estate.

MS. BRADSHAW: Exactly.

THE COURT: The issue that's been raised for me is a legal issue whether the junior lien interest is property of the estate --

MS. BRADSHAW: Well, with a point out, Your Honor, that it didn't become --

THE COURT: Stop. Stop.

MS. BRADSHAW: Sorry.

THE COURT: Don't interrupt me.

MS. BRADSHAW: I'm sorry; go ahead.

THE COURT: Do not interrupt me.

That seems to me to be a gaiting issue here. Parties dispute that legal issue but it is a legal issue.

Go ahead, Ms. Bradshaw.

MS. BRADSHAW: I'm sorry. I did not mean to interrupt you. It's just that on that point, the timing is what we are emphasizing it -- mainly that it wouldn't have evolved into a junior lien had the action, the HOA's foreclosure action, not been filed and if that foreclosure action was filed after the bankruptcy was commenced.

So my point is that the assets were already protected

by the automatic stay at the point when the HOA purportedly turned this lien into a junior lien.

The practicality of it is that were we permitted to proceed and foreclose on these assets, we would address, as we do in other jurisdictions, the lien of the HOA in that context, and the HOA would presumably have been made whole. We were deprived of that opportunity because the HOA filed its suit while the asset should have been under the protection of the bankruptcy commencement.

MS. ELLER: Your Honor, this is Crystal Eller in Las Vegas.

THE COURT: Go ahead, Ms. Eller. I already -- only -- ordinarily only allow one lawyer from each side to argue. But go ahead; I'll hear you briefly.

MS. ELLER: I understand that and I appreciate it very much. Just very, very briefly.

With regard to the allegation just made by Ms. Bradshaw, she stated that her lien would not -- 21st Mortgage's lien would not be junior; it would not have evolved to a junior lien status if it had not been for the HOA sale. That is not correct.

Under Nevada law by the Supreme Court of Nevada, the HOA has a super priority lien from the instance that the HOA CC&R and other governing documents such as the bylaws, are recorded with the county when the neighborhood is created by

the builder.

So her lien -- 21st Century Mortgage -- 21st Mortgage lien has always been junior. It didn't become junior upon the sale. And I think that could be of significance and that's why I spoke up. Thank you, Your Honor.

THE COURT: All right. Okay. Ms. Eller or Mr. Reynolds, do you wish to make a cross motion for summary judgment?

MR. REYNOLDS: Your Honor, if you deem it necessary, I would --

THE COURT: Well, I'd like -- if I agree with Ms. Bradshaw, her motion for summary judgment would get granted, but if I don't, the motion gets denied, then I'm left with a case that's sitting here when it does seem to me to be a pure legal issue.

While I think Rule 56(f) would give me the authority to go -- to add sua sponte, it would be my preference to add, if you wish -- you don't want to do it, fine; don't do it -- get your own cross motions filed. I will give Ms. Bradshaw a short time to respond. I'll decide whether any further argument is needed and I'll go ahead and rule.

MR. REYNOLDS: That's fine, Your Honor. I was just trying to conserve resources of the client, but I would point out that our opposition that was filed one week before the hearing stated in our request for relief that be awarded, such

a relief as this Court deems just, equitable, and proper including, but not limited to, summary judgment in favor of it in Invest Vegas.

Several days prior to this hearing, a reply was filed to these papers, and the reply did not address any issue concerning an award of summary judgment. So I would say that -- and I believe 56(f) may be applicable, but if Your Honor's preference is for a separate motion, we will file a separate motion.

THE COURT: My preference would be a separate motion so that there's no procedural quagmire, or if and when I go ahead and rule on the motions, it's quite clear what I have before me.

So how much time, Ms. Eller or Mr. Reynolds, do you want to file a motion?

MR. REYNOLDS: Judge, I would request two weeks to file a motion.

THE COURT: All right. And then, Ms. Bradshaw, how much time do you want to respond to that? And I don't think your arguments are any different than what I've been hearing already, but --

MS. BRADSHAW: Sorry, Your Honor. Logistics.

Two weeks, Your Honor.

THE COURT: Okay. All right. I'm going to enter an order that takes the pending motion under submission, gives the

plaintiff two weeks to file its -- a cross motion for summary judgment, the defendant two weeks to respond to it, no reply necessary or needed here. After receiving, at briefing, I'll decide whether I want to hear argument and I'll just go ahead and cite it on the papers, okay?

So we'll enter a brief --

MS. BRADSHAW: Yes, Your Honor.

THE COURT: -- to the effect I've just described.

MS. BRADSHAW: Yes, Your Honor. Thank you.

THE COURT: Okay. Thank you very much.

MS. ELLER: Thank you.

THE COURT: All right. I think that concludes our agenda. Is there anything else one of my clerks can point out to?

MS. ELLER: No, Judge, that's everything.

THE COURT: All right. We're adjourned. Thank you very much everybody.

MS. ELLER: Thank you, Judge.

MR. REYNOLDS: Thanks, Judge.

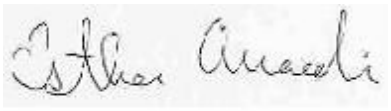
(Whereupon these proceedings were concluded at 11:16 AM)

I N D E X

RULINGS

**C E R T I F I C A T I O N**

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.



_____

ESTHER ACCARDI

AAERT Certified Electronic Transcriber CET**D 485

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: June 16, 2016

## D

## T